Senior Executives Association

P.O. Box 44808 • Washington D.C. 20026 • (202) 927-7000 • Fax (202) 927-5192 • www.seniorexecs.org

TESTIMONY

of

WILLIAM L. BRANSFORD

General Counsel

SENIOR EXECUTIVES ASSOCIATION

Before the

HOUSE GOVERNMENT REFORM COMMITTEE,
SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION

November 9, 2005

Mr. Chairman and Members of the Subcommittee:

The Senior Executives Association appreciates the opportunity to testify today about one of its longstanding proposals for reform in the area of federal employee appeals. As you know, the Senior Executives Association (SEA) is a professional association that represents the interests of career federal executives in the Senior Executive Service (SES) and those in Senior Level (SL), Scientific and Professional (ST), and equivalent positions. This career senior executive corps which SEA represents provides the consistent leadership, skills and institutional knowledge necessary to accomplish the work of the federal government effectively and efficiently through times of crisis as well as executing the everyday functions of government that keep our nation running. On their behalf, SEA advocates for improving the efficiency, effectiveness and productivity of the federal government. It is in that spirit which we submit this testimony.

For many years, federal managers and employees have labored under a complicated and mostly broken appeals mechanism that allows employees numerous bites of the apple, a multitude of different paths to pursue, and the ability to tie up management for years with frivolous complaints. Some federal employees abuse the complaint and appeals processes with impunity, slowing down the system for those cases that truly need consideration. A process for complaints and appeals is, of course, necessary for the protection of the integrity of government because it prevents the abuse of employees and preserves the merit system. In our opinion, however, the current dysfunctional system for raising EEO complaints, adverse action appeals, whistleblower complaints and labor grievances serves as a major barrier to managers' effective handling of problem employees, and it fosters an environment in which the public gains the perception that problem employees are tolerated by federal managers. Furthermore, it is wasteful and unnecessary to have so many lengthy and redundant processes.

SEA proposes that federal employee complaints and appeals currently investigated or adjudicated by the Merit Systems Protection Board, the Federal Labor Relations Authority, the federal EEO program and the Equal Employment Opportunity Commission, the Office of Personnel Management, and the Office of Special Counsel be consolidated into an independent Federal Employee Appeals Court. This new court would replace all existing appeals systems and would provide a simple and expeditious mechanism, resulting in protection of the merit system by resolving employee concerns with relative speed, impartiality and fairness, while preserving all employee appeals rights.

Today's federal manager has become an easy and convenient target. Sometimes under fire both from higher level management and by subordinates, the federal manager is often perplexed about how and when to do the right thing.

Surveys show federal employees perceive that their agencies do a poor job in dealing with problem employees and in making meaningful distinctions in performance. Proposals for reform of the federal performance management system mention the linchpin of manager accountability and an expectation that managers will hold their employees accountable for their performance. This feedback contributes to a manager's desire to do the important things that all

good supervisors should do when managing their workforce.

But let's take a realistic look at the environment under which the federal manager actually operates in dealing with a problem employee. Assume a manager wants to give a lowered performance appraisal with some negative comments because that manager in good faith believes the employee's performance is substandard. That manager risks the employee's visit to the EEO office to complain about discrimination, which could result in a complaint naming the manager as a responsible management official, a complaint that could eventually continue on for years, tying the manager's hands with the threat of a reprisal complaint if the manager proceeds with further action.

Alternatively, the employee can file a union grievance that the union can take to arbitration for those employees in a bargaining unit. A third possibility is for the employee to claim that a performance appraisal is whistleblower reprisal if the employee has had a past disagreement with a supervisor that the employee calls a protected disclosure. This would then go the Office of Special Counsel, and the employee could eventually appeal to the Merit Systems Protection Board. All of these avenues are readily available, and often are used for just one performance appraisal.

If the manager decides that the same employee is performing or behaving so poorly that he or she should be disciplined, the appeals process becomes even more complicated. The employee can appeal directly to the Merit Systems Protection Board if the proposed discipline is removal, demotion or a suspension of more than 14 days. At the MSPB, the employee can raise EEO defenses in what is called a mixed case. As an alternative, the employee can choose to utilize the agency EEO process with an eventual appeal on an adverse action to the MSPB. The employee can then go to federal court or to the EEOC. Or, if the employee does not go through the agency EEO process, but claims discrimination, the employee can still go to the EEOC and to federal district court after the MSPB. Again, whistleblower reprisal claims can go the Office of Special Counsel or to the MSPB directly for a covered adverse action. Employees in a bargaining unit can choose to go to the MSPB or, with the consent of their labor union, to arbitration.

This complicated process gives pause to even the best manager before taking action or even engaging in frank day-to day conversations about performance and work place conduct. For a manager, the most difficult step in dealing with the problem employee is often the first step that invites adversity, the first time that the manager counsels or warns a subordinate about unacceptable conduct or performance. It is no wonder that some managers come to the unfortunate and mistaken conclusion that it is better to ignore a problem employee rather than to invite all the EEO complaints and union grievances that might follow from doing the right thing and confronting the employee. Yet, inaction is the worst course, because future action to deal with a continuing problem will be more difficult, and avoidance contributes to the workplace and public perception that problem employees are tolerated in the federal civil service.

To deal with this perception problem, the DHS and DoD reform measures have granted those agencies the flexibility to design their own appeals systems and rules. In this reform, the

EEO process has not been touched, nor have EEO reform measures been suggested. During the debate of the last three years about reform of the employee appeals process, the Senior Executives Association has been a strong supporter of the continuation of Merit Systems Protection Board appeal rights for federal employees, an option that was ultimately adopted as both departments considered their reforms.

In our opinion, the Merit Systems Protection Board has not been the problem with the federal employee appeals system. The Board has rapidly processed cases and generally is supportive of reasonable management efforts to discipline problem employees and to respond to poor performance, while at the same time preventing abuses of the merit system. In most years the MSPB upholds management actions about 80 percent of the time and decides most cases in less than 100 days.

Contrast the MSPB's performance with what happens in a typical EEO case. According the 2004 Annual Report of the Equal Employment Opportunity Commission, the average processing time for a merit decision on an EEO case is 601 days when no EEOC judge is involved. Even counting cases withdrawn, dismissed, or settled, the Federal Government average for all EEO complaints not referred to an administrative judge is 469 days. A case that is refered to an EEOC judge takes even longer to adjudicate. It takes an average of 280 days to complete EEO investigations, even though regulations require they be completed in 180 days.

Of course, these are averages. There are numerous EEO complaints that are processed for four, five or six years. EEO professionals often candidly admit that employees sometimes misuse the EEO process to raise complaints of job dissatisfaction lacking evidence of discrimination because it is perceived as the only forum available in which a matter can be raised effectively and heard outside the agency.

Perhaps this is one reason the findings of discrimination in EEO cases is so low. In 2004, discrimination was found in 321 cases out of 23,153 complaints closed, or in 1.3 percent of the cases. Even considering only merit decisions and excluding cases settled, withdrawn, or dismissed, the percent of cases where discrimination is found is 2.94 percent. But the cases settled, withdrawn or dismissed were processed and did use time, energy and resources in the EEO system. About 20 percent of cases closed in 2004 were settled. This means that slightly less than 80 percent of EEO closings in 2004 were ultimately found to be without merit and that managers have had to work under the stigma of many frivolous EEO complaints for years because complaints take far too long to process.

One reason the EEO process is so clogged is that a very high percentage of those 23,153 complaints are fully investigated, even though it is apparent to any informed observer that the complaint lacks merit. Agencies do this because federal agencies investigate themselves when an EEO complaint is filed. To address concerns about a process that has inherent conflicts of interests, the federal sector EEO system responds by fully investigating and processing every EEO complaint even if it obviously lacks merit at the outset. An independent court—freed of the conflict of interest concern—can more effectively screen EEO complaints, focusing resources on the complaints that potentially have merit. The result would be faster justice for those

employees who are, in fact, victims of discrimination.

While it is true that the EEOC has developed a special expertise on employment discrimination, that expertise also exists at the Merit Systems Protection Board, where mixed cases containing EEO issues have been adjudicated for more than 25 years. In the new court, existing judges and other professionals from the MSPB and the EEOC could form a base to effectively and fairly consider discrimination cases.

From a manager's perspective, a problem employee filing an EEO complaint creates substantial challenges. The manager is not necessarily a part of the EEO process, but may spend years working with the very employee who accused the manager of illegal discrimination. Often an employee has no evidence of an improper discriminatory motive or action, but feels mistreated and sees no other avenue for recourse against perceived mistreatment. The manager, on the other hand, is concerned about the appearance of reprisal when making difficult and sometimes unpleasant personnel decisions. And, in a number of cases of which SEA has learned over the years, the mere existence of an EEO complaint can affect a manager's eligibility for awards and promotions or cause a lowered performance appraisal for the manager. Even if the complaint is later found to have no merit, the manager is left with that negative impact on his or her record, as well as lost professional opportunities. We believe that consolidating and simplifying the appeals process will relieve many of these concerns and make it easier and less risky for managers to confront work place problems readily, if for no other reason than the process will move faster.

SEA also proposes changes in the existing EEO process (to the extent a separate court is delayed in becoming a reality) so that managers are assured of rights during the process. We propose statutory assurances that managers accused of discrimination be informed of the accusation, allowed access to accusatory documents, be permitted representation during meetings and investigations, be consulted before a settlement of an EEO complaint becomes final, and be considered for reinstatement of lost promotions or awards and reconsideration of other negative personnel actions that occurred because of an EEO complaint that was ultimately found to lack merit.

Another part of our proposal is to move matters now subject to labor arbitration to this new consolidated court. We do not propose any elimination or reduction in collective bargaining, nor do we suggest changes in the use of a negotiated grievance procedure to deal with workplace concerns--other than substituting this proposed new court for the current arbitration option. All matters of contract interpretation and employee complaints or appeals could still be subject to full union representation in the grievance process and to an ultimate decision by an impartial judge. This would include matters now referred to the Federal Services Impasses Panel to resolve collective bargaining impasses. We also propose that this new court resolve unfair labor practices and other labor management disputes.

SEA foresees the possibility of federal sector labor unions raising objections to the placement of what is now labor arbitration in a separate court or agency. However, over the years, the MSPB has developed a sophisticated and relatively predictable body of law

concerning the rules of the workplace. It also has gained a reputation for speedy and impartial resolution of cases. We expect this practice by the MSPB, particularly its efficiency, to be incorporated into the new court. From our perspective, there really is no good reason for arbitration to continue, especially if an independent and specialized court can hear and decide all federal employee issues.

Moreover, many managers and human resource professionals perceive that the arbitration process is unreasonably geared toward employees when compared with Merit Systems Protection Board adjudication. Typically, agencies and unions split the arbitrator's fee, and both the agency and the union have to agree on the choice of the arbitrator or the means of selecting the arbitrator. Because of this, many managers believe that arbitrators often feel some pressure to view a case through the perspective of the management and union relationship, rather than by a focus on rules of the workplace as determined by MSPB precedent. Managers frequently refer to a tendency by arbitrators to split the baby or find some means to keep both the union and management happy. While we are not aware of empirical data to support the validity of this perception, the existence of the perception as it applies to arbitration is real. We are not aware of such a perception applying to MSPB adjudications, which are generally perceived as impartial, comprehensive, fair, reasonably predictable and supportive of the merit system and the efficiency of the service.

A question SEA cannot answer based on current data, but which should be considered, is the extent to which arbitrators' tendencies to mitigate penalties contributed to the Department of Homeland Security and the National Security Personnel System regulations (and proposed in the draft Working for America Act) substantially raising the legal standard for the MSPB or an arbitrator when mitigating a penalty choice that an agency has made for an adverse action. According to its 2004 Annual Report, the MSPB mitigated only 31 cases out of more than 6,000 appeals filed that year. It hardly seems worth all the effort to rewrite the rules and invite all the litigation for a mere 31 cases government-wide, only a handful of which were at Homeland Security or Defense. Perhaps the perception of arbitrator mitigation and the desire to more effectively control those arbitrators is what is really driving the rule change. It seems easier, simpler and just as fair to the employee and the merit system to allow all of these appeals to be heard in one place and to keep the mitigation rule as it has always been, i.e., mitigating only those penalties that are beyond the most reasonable penalty that could be imposed for an offense.

Under current law, after a federal employee with an EEO complaint has exhausted the lengthy and complicated administrative process discussed above, the employee can then go to federal district court and start all over, sometimes many years later. The creation of an Article I court with judges appointed by the President and confirmed by the Senate, and hearing examiners hired by the court to adjudicate more routine matters, creates a court with the capability to fully process and hear any federal employee EEO complaint. These Article I judges can be authorized to empanel juries and to award full relief, including compensatory damages authorized by law. No rights or considerations would be lost. But the process would only happen once, with subsequent review being limited to the traditional appellate process, but to the Circuit Court of Appeal for the Federal Circuit, to assure that a uniform body of the rules of the workplace is available to federal managers as they engage in the day to day work of running

their operations.

We also envision that this court would have a division for fact finding, dispute resolution and investigations. This is particularly important in fully resolving EEO and whistleblower reprisal claims. But the difference is that only meritorious cases will be investigated under a process supervised by an independent judge. If an EEO case is dismissed, the employee can appeal to the Federal Circuit. Otherwise, we envision the court's decision to be final. The division of the court for investigations and dispute resolution could employ the many EEO professionals who might be displaced by the adoption of this new process in offices set up in different parts of the country.

We consider the current system to be redundant, wasteful and complex. But most of all, we believe it simply takes too long. There is nothing more frustrating for a federal employee than to prevail in an EEO complaint six years after it has been filed and to realize that justice cannot be attained because circumstances have so changed in the lengthy time span during which the complaint was processed. Similarly, for those managers in the approximately 17,000 EEO complaints filed annually without merit, the burden of managing those subordinate employees over the long period of the complaint lifespan is an unreasonable burden that should now be relieved.

We conclude by stating that a fair and objective review and the state of the current system points to the need for a fairer, faster and simpler solution - one place to seek redress for legitimate federal employee workplace complaints, the Federal Employees Appeals Court.